NO. 82-6990

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DERICK LYNN PETERSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the trial court's refusal to answer the jury's question concerning the possibility of future parole impermissibly restrict the consideration of mitigating factors?

B. Was the trial court's admission of a threat made by the petitioner to one of his victims violative of the petitioner's constitutional rights?

C. Was the trial court's admission of evidence relating to certain of petitioner's previous convictions pending on appeal violative of petitioner's constitutional rights?

D. Did the Virginia Supreme Court unconstitutionally restrict its proportionality review of petitioner's death sentence by only reviewing cases in which the death penalty was actually imposed?

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PRELIMINARY STATEMENT

The Commonwealth of Virginia, the respondent herein, respectfully prays that a writ of certiorari to the judgment of the Supreme Court of Virginia entered in this case on April 29, 1983, not be granted.

For purposes of uniformity, the parties will hereinafter be referred to as the petitioner and the Commonwealth, and all page references will be to the Joint Appendix filed in the Supreme Court of Virginia by the petitioner and the Commonwealth and designated (App. ___), and to the Respondent's Appendix filed herewith and designated (Resp. App. ___).

OPINION BELOW

The opinion of the Supreme Court of Virginia affirming the judgment of the Circuit Court for the City of Hampton was

rendered on April 29, 1983, and is reported as 225 Va. ___, 302 S.E.2d 520 (1983).

JURISDICTION

The petitioner claims that jurisdiction is founded upon Rule 17.1(c) of the Rules of this Court.

STATEMENT OF THE CASE

The trial of this case came to be heard in the Circuit Court for the City of Hampton, Virginia, upon an indictment charging the petitioner with capital murder during the commission of a robbery, while armed with a deadly weapon, in violation of § 18.2-31 of the Code of Virginia.

At the trial, Dwight Wilson testified that he was an employee of the Pantry Pride supermarket on Pembroke Avenue in the City of Hampton on February 7, 1982. At approximately 6:00 p.m., as he was working as a cashier some twenty-five feet from the store's office, Wilson observed the petitioner force his way into the office where Howard Kauffman, the store's accountant, was preparing the day's bank deposit. (App. 32-38.)

The petitioner grabbed a bank deposit bag from the desk where Kauffman was working. Kauffman retreated across the office, but the petitioner produced a gun and shot him in the abdomen. The petitioner then ran from the store. (App. 38-42.)

Wilson further testified that the store was brightly lit, and he saw the petitioner's face because he was not wearing a disguise. Nothing impeded Wilson's view of the shooting, and he was certain of his identification. (App. 39-43.)

Four days later, Wilson was shown a group of photographs by the police. He selected the petitioner's picture from the array and, the next day, he picked the petitioner out of two different line-ups. Wilson also identified the petitioner at the preliminary hearing and at trial as the man who shot and robbed Howard Kauffman. (App. 45-46.)

Wanda Scott testified that she was also working as a cashier at the store when Kauffman was shot. She was stationed at the register next closest to the office, and she saw the petitioner force his way in. After petitioner entered the office, Scott saw him grab something and shoot Kauffman. Nothing blocked her view of the shooting, and the petitioner was not disguised. (App. 55-57.)

Scott did not remember what she told the police after viewing a photographic array (App. 58), but Detective Edgar Browning testified that she had picked out the petitioner's picture. (Supp. App. 1.) She also identified the petitioner from a lineup, at the preliminary hearing and at trial. (App. 59.)

Another employee of the Pantry Pride store, Donald Thomas, was also working the night Kauffman was killed. He was standing about five feet from the petitioner when Kauffman was shot. Thomas selected the petitioner's picture from a photographic lineup and identified him at the preliminary hearing and at trial as the man who shot Kauffman with a large black gun. (App. 65-68.)

Three patrons of the Pantry Pride store also testified at the petitioner's trial. Robin Barlow and John Chavas saw the petitioner peering into the supermarket just prior to the shooting and saw him run from the scene with a gun in his hand afterwards. (App. 88-90, 98-100.)

Jean Sarver stated that a white vehicle forced her off the road as she approached the store directly after the shooting. The vehicle was driven by the petitioner, who she identified at a lineup and at trial. It was traveling at a high rate of speed. (App. 80-87.)

An autopsy was performed on Howard Kauffman's body after the shooting. The cause of death was found to be a single gunshot wound to the abdomen which severed the illiac artery causing a great amount of blood loss. (App. 106-109.)

The day after the shooting and robbery, an audit of the Pantry Pride's books was done. A deposit bag containing $6,005.02 -- $2,025.32 in checks and $3,979.70 in cash -- was found to be missing. (App. 110-114.)

No evidence was presented on the petitioner's behalf (App. 125), and the jury found him guilty of capital murder as charged in the indictment. He was also found guilty of using a firearm illegally and of robbery. (App. 126, 1, 3.)

Subsequent to the petitioner being found guilty of capital murder, the punishment stage of his trial commenced. During this phase of the trial, the Commonwealth presented three witnesses.

Two of the witnesses, Sheila Coffey and Garrie Anne Baize, were victims of other robberies committed by petitioner and they described those incidents. (App. 130-138.) Baize also stated that, after testifying against the petitioner at the preliminary hearing in her case, the petitioner told her: "I'll remember you, and I'm going to get you, you mother fucker." (App. 139.)

The third witness was Sharon Bonville, a probation officer, who gave the petitioner's prior record. It included

attempted armed robbery and robbery as a juvenile and breaking and entering, grand larceny, and robbery at a Revco Drug Store as an adult. He had also been convicted of robbing an employee of a Family Dollar store, but had not been sentenced at the time of the trial herein. (App. 140-144.)

The petitioner's mother was the only witness who testified on his behalf during the penalty stage of the trial. She stated that the petitioner was twenty-one years old. He had a son and a daughter, and she had never seen him take any drugs. She had never known him to have a gun, and she did not believe him to be a violent person. (App. 150-154.)

After being instructed on the law with respect to the petitioner's punishment, the jury found that there was a probability that he would commit criminal acts of violence in the future and would constitute a continuing serious threat to society. His sentence was then unanimously fixed at death. (App. 157.)

A pre-sentence report was prepared and considered by the trial court pursuant to Virginia Code § 19.2-264.5. The trial court refused to set aside the jury's verdict and, on September 24, 1982, sentenced the petitioner to death pursuant to Virginia Code § 18.2-10.

Petitioner then appealed his conviction and death sentence to the Supreme Court of Virginia, which accorded his case priority status. On April 29, 1983, the Supreme Court of Virginia affirmed petitioner's conviction and held that the penalty imposed was neither excessive nor disproportionate.

ARGUMENT

A. THE TRIAL COURT'S REFUSAL TO ANSWER THE JURYS' QUESTION CONCERNING THE POSSIBILITY OF FUTURE PAROLE DID NOT IMPERMISSIBLY RESTRICT THE CONSIDERATION OF MITIGATING FACTORS.

Petitioner points out that this Court concluded in Lockett v. Ohio, 438 U.S. 586 (1978), that "any aspect of a defendant's character or record and any of the circumstances of the offense" should be considered by the jury as a factor in mitigation of the death penalty. Petitioner fails to note, however, that this general statement was qualified by the following notation:

> Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense.

Id. at 604, n.12.

Here, petitioner complains that he was denied the right to present mitigating evidence when the trial judge responded as follows to the jury foreman's question whether or not it was possible to give a life sentence without parole:

> The only response I can give you on that, Mrs. Buckingham, is that it's the function of the jury, duty of the jury, to impose such a sentence as they consider just under the evidence and the instructions of the court. And you should not concern yourself with what may thereafter happen. It may not be a very satisfactory answer, but its the only one I can give you. (App. 156.)

And the Supreme Court of Virginia held this is to be a correct statement of Virginia law, whether in a capital case or otherwise.

Virginia Code § 19.2-264.4B specifies certain factors which may be considered in mitigation of sentence, but does not limit the jury to just these criteria. The Commonwealth submits, however, that petitioner's possible parole eligibility was irrelevant to his "character, prior record" or the

"circumstances of his offense" and was thus not a legitimate mitigating factor. Moreover, there are sound reasons for not allowing the introduction of such evidence. See Hinton v. Commonwealth, 219 Va. 492, 495, 247 S.E.2d 704 (1978).

Here, petitioner asserts that the jury had the right to know that "a single life sentence meant that the defendant would not be eligible for parole until after serving fifteen years and that persons convicted of two or more life sentence[s] would not be eligible for parole until after serving twenty years."[1] (Petitioner's Petition.) But, since the jury specifically questioned whether petitioner could receive a life sentence without parole, it is incomprehensible that telling them that he could be back on the street in 20 years would have caused them to opt for life imprisonment.

If the jury could have been told that petitioner would not be eligible for parole for 20 years, then it would have only been fair to tell them about the Virginia "good time" laws which can make a prisoner with two life sentences eligible for parole in a much shorter period. See Code § 53.1-198, et seq. Indeed, the logical extension of such an instruction would be to point out to the jury that a defendant might escape at any time.

Finally, questions of parole are inconsistent with the fact that the safety of other prison inmates are also to be considered: "It was not beyond the bounds of propriety...for the prosecutor to suggest that [a capital murderer] might kill an inmate if he were sentenced to life imprisonment."

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[1]On appeal to the Virginia Supreme Court, petitioner claimed the jury should have been told that petitioner would never have been eligible for parole.

Clanton v. Commonwealth, 223 Va. 41, 54, 286 S.E.2d 172 (1982).

It is respectfully submitted, therefore, that the question of future parole is not a legitimate mitigating factor. If anything, the use of such evidence would do far more harm to a capital defendant's chances of avoiding the death penalty than good.

In any event, it is a matter of State law, not involving a federal constitutional question: "[T]he wisdom of the decision to permit juror consideration of possible commutation [or parole] is best left to the States." California v. Ramos, ___ U.S. ___, 33 Cr.L. 3306, No. 81-1893 (July 6, 1983).

B. THE TRIAL COURT'S ADMISSION OF A THREAT MADE BY THE PETITIONER TO ONE OF HIS VICTIMS WAS NOT VIOLATIVE OF THE PETITIONER'S CONSTITUTIONAL RIGHTS.

Virginia Code § 19.2-264.4B allows the introduction in the penalty phase of evidence relevant to sentencing, including the history and background of the defendant. Such evidence is still subject to the rules of evidence governing admissibility. Not only is the use of such evidence not completely unfettered as petitioner suggests, the evidence he complains of was clearly relevant to ascertain the likelihood of future violence.

After Garrie Ann Baize, one of the petitioner's prior robbery victims, testified against him at his preliminary hearing for the robbery of the Family Dollar store on February 8, 1982, the petitioner told her: "I'll remember you, and I'm going to get you, you mother fucker." (App. 139.) The petitioner now complains that evidence of this statement introduced during the penalty phase of his capital

murder trial should have been stricken because the statute allows the jury too much discretion. It is noted, however, that this evidence was not objected to at trial. It cannot now be raised in a federal forum. See Wainwright v. Sykes, 433 U.S. 72 (1977).

Nevertheless, without conceding that this issue is properly before this Court, the Commonwealth submits that the testimony was relevant and admissible under Code § 19.2-264.4. Part C of that statute provides, in part, that the death penalty shall not be imposed unless the Commonwealth proves beyond a reasonable doubt that there is a "probability based upon evidence of the prior history of the defendant... that he would commit criminal acts of violence that would constitute a continuing serious threat to society...." (Emphasis added.) It is the duty of the jury to consider all evidence relevant to sentencing, both good and bad, before finding that a defendant has a propensity to violence making him a societal menace. Stamper v. Commonwealth, 220 Va. 260, 276, 257 S.E.2d 808, cert. denied, 445 U.S. 972 (1979).

The mere record of a defendant's previous convictions may give the jury an inaccurate or incomplete impression of his disposition or temperament. Id. at 276. And it is submitted that the vulgar threat petitioner made to Ms. Baize was relevant to a consideration of his history and background: Not only did his threat show a complete lack of remorse or regret for the crime he had committed against her,[2] what could be more relevant to determining his provity to violence than his own promise that he still

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[2]Such lack of regret or remorse is "obviously proper testimony for a jury to consider in determining whether such person would in all probability commit criminal acts of violence in the future." Clark v. Commonwealth, 220 Va. 201, 210, 257 S.E.2d 784, cert. denied, 444 U.S. 1049 (1979).

intended to commit future acts of violence against a former victim.

The sentencing discretion of juries in capital cases is not uncontrolled in Virginia. This evidence was legitimate and relevant.

C. THE TRIAL COURT'S ADMISSION OF EVIDENCE RELATING TO CERTAIN OF PETITIONER'S PREVIOUS CONVICTIONS PENDING ON APPEAL DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner complains that two previous convictions for robbing employees of a Family Dollar Store and a Revco Drug Store should not have been used during the penalty phase to show his prior record because they were pending on appeal at the time of his capital murder trial. However, under Virginia law, the pendency of an appeal merely postpones the execution of sentence. Virginia Code § 19.2-319; Rule 1:1 of the Rules of the Supreme Court of Virginia. And the postponement of the execution of sentence in a criminal case for purposes of appeal does not affect the finality of judgment. Hirschkop v. Commonwealth, 209 Va. 678, 166 S.E.2d 322, cert. denied, 396 U.S. 845 (1969).

Moreover, trial proceedings are presumed to be correct unless and until they are reversed on appeal. For example, the pendency of an appeal does not preclude use of a conviction for impeachment purposes. See Block v. United States, 226 F.2d 185 (9th Cir. 1955), cert. denied, 350 U.S. 948 (1955), reh'g denied, 350 U.S. 977 (1956).

Finally, the Commonwealth notes that on April 21, 1983, the Supreme Court of Virginia found that there was no reversible error in the two judgments in question and therefore refused the petitions for appeal filed thereto.

(Resp. App. at 1-2.) These refusals were findings on the merits of the cases. Saunders v. Reynolds, 214 Va. 697, 204 S.E.2d 421 (1974).

D. THE VIRGINIA SUPREME COURT'S PROPORTIONALITY REVIEW OF PETITIONER'S DEATH SENTENCE WAS PROPER.

Without conceding that it would be unconstitutional for the Virginia Supreme Court to only consider cases in which the death penalty is actually imposed in conducting its proportionality review of a defendant's death sentence, the Commonwealth points out that the Supreme Court of Virginia does not so restrict its review. In its written opinion in the instant case, the Virginia Supreme Court stated:

> From our examination of the record, and our comparison of Peterson's record and history with those of other defendants in capital-murder cases, we conclude that juries generally in this jurisdiction impose the death penalty for conduct similar to that of Peterson.

And the "capital-murder cases" referred to include both the ones in which the death penalty was meted out and the ones in which the defendants received life sentences:

> In order to guard against arbitrary, capricious, and discriminatory imposition of the death penalty, Code § 17-110.1C2, E, requires that we compare the case under review with "similar cases" and, in aid of that comparison, to "accumulate the records of all capital felony cases..as a guide in determining whether the sentence imposed in the case under review is excessive." In the first case decided after the effective date of that statute, we entered an order directing the Clerk of this Court to comply with the legislative directive. See Smith v. Commonwealth, 219 Va. at 482, n.8, 248 S.E.2d at 151. The Clerk has done so. All capital murder cases, including not only those in which the death penalty was imposed and reviewed by this Court but also those in which the jury or trial judge imposed a life sentence and the defendant petitioned this Court for appeal of his conviction, have been inventoried and indexed apart from other criminal cases.

Whitley v. Commonwealth, 223 Va. 66, 81, 286 S.E.2d 162, cert. denied, ___ U.S. ___, 103 S.Ct. 181 (1983).

CONCLUSION

For the reasons presented, the Commonwealth of Virginia, the respondent herein, respectfully contends that the issues raised in this case deal with matters of State law and/or are neither important nor substantial and that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Respondent herein.

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CERTIFICATE OF SERVICE

I hereby certify that I, Richard B. Smith, Assistant Attorney General of Virginia, am a member of the Bar of this Court, and that on this 25th day of July, 1983, mailed, with first class postage prepaid, three copies of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI to J. Gray Lawrence, Esquire, One East Plume Street, P. O. Box 3688, Norfolk, Virginia 23514, Counsel for petitioner.

Richard B. Smith

Richard B. Smith
Assistant Attorney General

RESPONDENT'S APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 21st *day of* April, 1983.

Derick Lynn Peterson, Appellant,

against Record No. 822075

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Hampton

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the court is of opinion there is no reversible error in the judgments complained of. Accordingly, the court refuses the petition for appeal. Code § 8.01-675.

The said circuit court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee	$350.00 plus his costs and expenses
Filing fee	25.00

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 21st *day of* April, 1983.

Derick Lynn Peterson, Appellant,

against Record No. 822012

Commonwe lth of Virginia, Appellee.

From the Circuit Court of the City of Hampton

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the court is of opinion there is no reversible error in the judgments complained of. Accordingly, the court refuses the petition for appeal. Code § 8.01-675.

The said circuit court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee	$350.00 plus his costs and expenses
Filing fee	25.00

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk